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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 314

NICK J. CHRISTIANA,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

JACK WASSERMAN
DAVID CARLINER
Warner Building
Washington, D. C.

G. WRAY GILL, SR.
GEORGE M. LEPPERT
Pere Marquette Building
New Orleans, Louisiana

Attorneys for Petitioner

INDEX

OPINIONS BELOW 1
JURISDICTION 2
QUESTIONS PRESENTED 2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3
STATEMENT OF THE CASE 5
REASONS FOR GRANTING THE WRIT 8
CONCLUSION 13
APPENDIX A - Opinion of Supreme Court of Louisiana . . . App. 1
APPENDIX B - Per Curiam of Criminal District Court for the Parish of Orleans. . . . . App. 14

CITATIONS

CASES:

Adler v. Board of Education, 342 U.S. 485 (1952) 12
Anguilar v. Texas, 378 U.S. 108 (1964) 10
Beck v. Ohio, 379 U.S. 89 (1964) 9
Berger v. United States, 295 U.S. 78 (1934) 11
Gaitlin v. United States, 326 F.2d 666 (D.C. Cir. 1963) 8
Hair v. United States, 289 F.2d 894 (D.C. Cir. 1961) 8
Heiner v. Donovan, 285 U.S. 312 (1931) 12
Henry v. United States, 361 U.S. 98 (1959) 9
Jencks v. United States, 353 U.S. 668 (1956) 11
Kasle v. United States, 233 Fed. 878 (6th Cir. 1916) 11
Ker v. California, 374 U.S. 23 (1963) 7, 8
Lambert v. California, 355 U.S. 225 (1957) 11
McIlvaine v. Louisiana, 379 U.S. 10 (1964) 10
Manley v. Georgia, 279 U.S. 1 (1928) 12
Milanovich v. United States, 365 U.S. 551 (1961) 10

Miller v. United States, 357 U.S. 301 (1958) 8
Schaffer v. United States, 221 F.2d 17 (5th Cir. 1955) 11
Schlesinger v. Wisconsin, 270 U.S. 230 (1925) 12
Semayne's Case, 5 Co. Rep. 91a, 77 Eng. Rep. 194 (1603) . . . 8
Smith v. California, 361 U.S. 147 (1959) 11
State v. Henry, 196 La. 218, 198 So. 910 (1940) 12
State v. Roberts, 152 La. 283, 93 So. 95 (1922) 10
State v. Smith, 196 La. 652, 199 So. 791 (1941) 12
Stage v. Ugarte, 176 La. 54, 145 So. 266 (1933) 10
United States v. Goldman, 352 F.2d 263 (3rd Cir. 1965) 10
United States v. Spangelet, 258 F.2d 338 (2nd Cir. 1958) . . . 12
United States v. Sims, 231 F. Supp. 251 (D.C. Md. 1964) 8
United States v. Ventresca, 380 U.S. 102 (1965) 10

CONSTITUTIONAL PROVISIONS AND STATUTES:

Louisiana Constitution:
Article 1, Section 7 4
Article 1, Section 9 4

Louisiana Revised Statutes:
Section 14:25 4
Section 14:29 4
Section 15:85 4
Section 15:217 4
Section 15:381 5
Section 15:550 5
Section 15:566 5

United States Constitution:
Fourth Amendment 3
Fifth Amendment 3
Fourteenth Amendment 3

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STATE OF LOUISIANA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF LOUISIANA

Nick J. Christiana, by his attorneys, petitions for a writ of certiorari to review a judgment of the Supreme Court of Louisiana affirming petitioner's conviction for being an accessory after the fact to robbery and receiving stolen money.

OPINIONS BELOW

The opinion of the Supreme Court of Louisiana dated May 2, 1966, is unreported and is set forth in Appendix A hereto (R. 471). A petition for rhearing was denied on June 6, 1966 (R. 492). The relevant per curiam rulings of the Criminal District Court for the Parish of Orleans dated December 17, 1965, are set forth in Appendix B (R. 72-77, 103-104, 107-108).

JURISDICTION

The decision of the Court below was filed May 2, 1966. On June 6, 1966, a petition for rehearing was denied. The jurisdiction of this Court is conferred by 28 U.S.C. 1257 (3).

QUESTIONS PRESENTED

1. Whether the arrest without a warrant and search of petitioner's person were lawful and constitutional where the police invaded petitioner's private office and opened the door of such office without announcement of purpose or refusal of admittance contrary to Article 72 of the Louisiana Criminal Code. Whether the statutory requirement of announcement of purpose and refusal of admittance are to be waived in the absence of evidence that police officers failed to comply because they feared for their lives or feared the destruction of evidence.

2. Whether probable cause for an arrest without a warrant existed for arrest for accessory after the fact to robbery where police officers saw petitioner with a bundle of uncounted and unidentified money in his hand in his private office with a robbery suspect for whom petitioner acted as bondsman.

3. Whether a search warrant issued after petitioner's arrest and based upon an application which merely stated that the police officer "has good reason to believe that further evidence of the crime of 14:25 is at the premises" was valid.

4. Whether convictions and separate consecutive sentences for accessory after the fact to robbery and receiving money stolen in such robbery subject petitioner to double punishment contrary to the Constitutions of Louisiana and the United States.

5. Whether the statutory crime of receiving stolen goods in Louisiana based alternatively upon negligence or criminal intent and the trial court's charge under such

statute that possession of property recently stolen is evidence of such crime are constitutionally valid.

6. Whether petitioner, a bondsman in criminal cases, was denied a fair trial and due process by reason of the prejudicial summation of prosecuting attorneys accusing him of maneuvering criminals on the street like checkers and compelling desperate and destitute people to steal.

7. Whether the denial of bail to petitioner pending appeal solely upon the basis that he has been sentenced for five years on one count herein and without regard to his availability or his lack of danger to the community, violates his constitutional right to due process and equal protection of law.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fifth Amendment to the United States Constitution provides, in part:

> "* * * nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb * * *."

The Fourteenth Amendment to the United States Constitution provides, in part:

> "No state shall make or enforce any laws which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."

Article 1, Section 7, of the Louisiana State Constitution provides, in part:

> "* * * no * * * search or seizure shall be made except upon warrant therefor issued upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Article 1, Section 9, of the Louisiana State Constitution provides, in part, that persons shall not:

> "be twice put in jeopardy of life and liberty for the same offense * * *."

Section 14:25 of the Revised Statutes of Louisiana provides:

> "*Accessory after the fact.* An accessory after the fact is any person who, after the commission of a felony, shall harbor, conceal, or aid the offender, knowing or having reasonable ground to believe that he has committed the felony, and with intent that he may avoid or escape from arrest, trial, conviction or punishment."

Section 14:69 of the Revised Statutes of Louisiana provides:

> "*Receiving Stolen things.* Receiving stolen things is the intentional procuring, receiving, or concealing of anything of value which has been the subject of any robbery or theft, under circumstances which indicate that the offender knew or had good reason to believe that the thing was the subject of one of these offenses."

Section 15:85 of the Revised Statutes of Louisiana provides:

> "*Persons not bailable.* No person charged with a capital offense shall be admitted to bail if the proof of his guilt is evident, or the presumption is great, or after conviction of a felony; provided that where a sentence of less than five years at hard labor is actually imposed, bail shall be allowed pending appeal and until final judgment."

Section 15:217 of the Revised Statutes of Louisiana provides:

> "*Charge of crime: Restrictions.* Except as otherwise provided under this title, no indictment shall charge more than one crime, but the same crime may be charged in different ways in several counts."

Section 15:381 of the Revised Statutes of Louisiana provides:

> "*Scope - Law and Evidence - Prejudice.* Counsel may argue to the jury both the law and the evidence of the case, but must confine themselves to matters as to which evidence has been received, or of which judicial cognizance is taken, and to the law applicable to the evidence; and counsel shall refrain from any appeal to prejudice."

Section 15:550 of the Revised Statutes of Louisiana provides:

> "*Bail pending appeal in felony cases.* No person convicted of a felony shall be discharged on bail pending his appeal; provided that when a sentence of less than five years at hard labor is actually imposed, bail shall be allowed pending appeal and until final judgment."

Section 15:566 of the Revised Statutes of Louisiana provides:

> "*Delivery of convict to penitentiary.* The sheriff, within fifteen days of the date upon which any sentence to imprisonment at hard labor shall become final, shall, unless the Governor shall have reprieved said convict, deliver the convict to the warden of the state penitentiary at Baton Rouge."

STATEMENT OF THE CASE

Petitioner was charged and convicted for unlawfully (R. 11-17) becoming an accessory after the fact to armed robbery by one Thomas Williams in that he did harbor, conceal and aid Williams contrary to the Revised Statutes of Louisiana 14:25 (Count One) and for receiving stolen money taken in such robbery in the sum of $655.00 contrary to Revised Statutes 14:69 (Count Two). The latter section authorizes a conviction if a person had good reason to believe that the received goods were stolen.

Petitioner, a bondsman, was arrested on September 1, 1965, without a warrant in his private business office by police officer Flint. The latter, together with two other members of the police force, entered the bail bonding offices of petitioner without an arrest or search warrant, seeking Thomas Williams who had committed armed robbery a half-hour previously. After entering the reception room, Officer Flint, armed with a shotgun, proceeded to the private office of petitioner and opened the closed door of such office without knocking or announcing his purpose. There he found Williams and petitioner. Williams was first placed under arrest and searched. Several .38 caliber shells were seized from his person and a .38 caliber gun was seized from the drawer of petitioner's desk at which Williams was seated. Williams made no statement at that time implicating petitioner, but petitioner was seen placing a bundle of money in his left pocket. He was arrested as an accessory after the fact and all the money in his left and right pockets were seized.

Later on September 1, 1965, the same day, a search warrant was sought by Officer Flint alleging that he had "good reason to believe that further evidence of the crime of 14:25 is at the premises". With this search warrant (State Ex. 13, R. 205-210) records pertaining to a bond posted by petitioner for Williams on August 29, 1965, and other records were seized and later introduced in evidence.

A pretrial motion to suppress (R. 21) the evidence seized at the time of arrest and subsequent thereto was denied upon the ground that the police had no time to secure a warrant of arrest (R. 204). Thereafter, the Criminal District Court asserted (R. 75-76):

> "What the officers saw Nick Christiana doing as they entered the office is what caused them to arrest Christiana.
>
> * * *
>
> "To require Officer Flint to stop at his door and an-

nounce his purpose would amount to subjecting him to a hazard beyond even that required by his profession.

"Evidence could have been destroyed or secreted (such an attempt was made by Christiana) while the officer waited for a refusal of admittance.

"The officer or the defendant's life could have been placed in jeopardy by a delay at the door."

The Supreme Court of Louisiana approved the foregoing basis for excusing the announcement of purpose and refusal of admittance required by Article 72 of the Louisiana Criminal Code (Appendix A). Reliance was placed below upon *Ker v. California*, 374 U.S. 23 (1963). However, unlike *Ker v. California*, no testimony was ever adduced herein that the police feared destruction of evidence, danger to their lives or the life of petitioner if they complied with the statute. Police Officer Flint testified merely that he did not call out Williams' name because of fear that he might endanger himself (R. 188). He was never questioned as to why he failed to announce his purpose or knock on petitioner's door.

Petitioner's conviction for recieving stolen money was based upon a statute and charge to the jury which permitted a finding of guilt based upon negligence and recent possession (R. 460-462). He was convicted on November 24, 1965, of accessory after the fact to robbery and receiving money stolen in such robbery and sentenced on December 13, 1965 to consecutive terms of five years and three years at hard labor in the penitentiary for each count. In their summation, the prosecuting attorneys appealed to the emotions of the jury alleging that society would be better off with petitioner in jail, that petitioner maneuvered criminals on the street like checkers and that he compelled desperate and destitute people to rob (R. 89-90). None of these allegations were true or based upon matters of record.

By reason of the five year sentence at hard labor on the accessory charge, petitioner has been denied bail

pending appeal, although no claim can be made that his presence at large would endanger society or that he would abscond. Had he been sentenced on this charge to one day less, bail would have been required and granted. Petitioner has a medical history of two heart attacks, hypertension and diabetes. He has been in the Parish jail since his conviction on November 24, 1965. Under Louisiana law this period of detention is not counted in computing the time served (Revised Statutes 15:566). Had he not filed an appeal, he would have been delivered to the penitentiary to begin serving his sentence immediately after conviction.

REASONS FOR GRANTING THE WRIT

1. *Ker v. California*, 374 U.S. 23 (1963), has been the subject of divergent views. Some courts find the case "particularly difficult to interpret because there was no opinion of the Court in which the five justices concurred in its entirety" *United States v. Sims*, 231 F. Supp. 251 (D.C. Md. 1964). The courts below, following the *Ker* case (R. 75-76, 477), expand its doctrine and hold that even in the absence of evidence establishing likelihood of destruction of evidence or danger to life, the statutory requirement of announcement of purpose and refusal of admittance may be excused before breaking and entering the privacy of one's office. Contrary to the decision below, decisions interpreting the identically worded federal statute, 18 U.S.C. 3109, have held that reasonable belief of increased bodily harm to an arresting officer does not excuse announcement of purpose. *United States v. Sims*, 231 F. Supp. 251 (D.C. Md. 1964); *Gaitlin v. United States*, 326 F.2d 666 (D.C. Cir. 1963); *Hair v. United States*, 289 F.2d 894 (D.C. Cir. 1961).

The announcement requirement of the statute here under consideration is not only identical with 18 U.S.C. 3109, but similar to those enacted in twenty-six states. *Miller v. United States*, 357 U.S. 301, 308, note 8 (1958). The requirement was pronounced in 1603 in *Semayne's Case*, 5 Co. Rep. 91a, 77 Eng. Repr. 194, 195, and is one basic to

our jurisprudence. Whether it is to be eroded in the absence of evidence establishing exigent circumstances, whether persons may be deprived of its statutory benefits in the absence of proof justifying dispensation of the statute, is an important statutory question affecting the criminal jurisprudence of Louisiana, the federal courts and of many states. Whether *Ker v. California*, is to be expanded to justify the decision below is a constitutional problem justifying intervention by this Court.

2. The finding of the trial court is clear that petitioner was arrested as an accessory after the fact because of what the police officer saw upon entry into his private office (R. 75-76). Upon entry the police officer merely saw petitioner, a bondsman, with a bundle of uncounted, unidentified money and a robbery suspect who had been bonded by petitioner seated in the office. This furnished no basis for a prudent man to conclude that petitioner was guilty as an accessory after the fact - that he was sheltering or aiding a felon to escape arrest, trial or punishment. The decisions below are contrary to *Henry v. United States*, 361 U.S. 98 (1959), and *Beck v. Ohio*, 379 U.S. 89 (1964). What the police officer saw upon entry would not have justified a magistrate in issuing a warrant of arrest for the crime of accessory after the fact.

3. A search warrant was issued herein (State Ex. 13, R. 205-210) upon an application stating that the police officer:

> "has good reason to believe that further evidence of the crime of 14:25 (accessory after the fact) is at the premises."

Evidence seized under this warrant was utilized at the trial below (State Ex. 9-12).

Probable cause is required by the United States Constitution and by the Louisiana State Constitution for the issuance of a search warrant. The conclusory affidavit of the police officer did not furnish probable cause and the evidence seized pursuant to the search warrant (State Ex. 9-

12) should have been suppressed. The decisions below sustaining the search and seizure are contrary to *United States v. Ventresca*, 380 U.S. 102 (1965); *Anguilar v. Texas*, 378 U.S. 108 (1964), and *McIlvaine v. Louisiana*, 379 U.S. 10 (1964).

The failure to observe the constitutional requirement of probable cause herein and the proper administration of criminal justice in state courts justify intervention herein by the Supreme Court.

4. Under Louisiana law no indictment or information may charge more than one crime but the same crime may be charged in different ways (Revised Statutes 15:217). Petitioner was sentenced to consecutive terms at hard labor under an information charging him with being an accessory after the fact to robbery and receiving money stolen in such robbery. Federal and state cases recognize that the legislatures have refused to punish for theft and unlawfully receiving the same property. *Milanovich v. United States*, 365 U.S. 551 (1961); *State v. Ugarte*, 176 La. 54, 145 So. 266 (1933). Here, petitioner is being subjected to double punishment in a similar situation - for being an accessory to robbery of money and for receiving the same stolen money. If he be guilty of a crime, petitioner has offended society in only one way - by his contact with the felon after the robbery. See *United States v. Goldman*, 352 F.2d 263 (3rd Cir. 1965). Under Louisiana law the test of identity of offenses is not technical but substantial identity. *State v. Roberts*, 152 La. 283, 93 So. 95 (1922). Considering the fact that petitioner could only be charged in one information of the same crime in different ways, it is clear that substantial identity of offense was presented. Petitioner is being illegally subjected to double punishment for the same offense. Both counts of the information were improperly submitted to the jury, contrary to *Milanovich v. United States*, 365 U.S. 551 (1961), and contrary to the Fifth Amendment and the Louisiana State Constitution.

5. The Louisiana statute (Revised Statutes 14:69) authorizes a conviction for receiving stolen things "under circumstances which indicate that the offender knew or had good reason to believe that the thing" was stolen. Under this statute criminal liability is fixed by requiring a petitioner with a third grade education to measure to the standard of mentality of some imaginary man of ordinary intelligence. Stupidity or negligence may determine whether a person is guilty of the commission of a felony. *Schaffer v. United States*, 221 F.2d 17 (5th Cir. 1955); *Kasle v. United States*, 233 Fed. 878 (6th Cir. 1916). By eliminating criminal intent from the crime of receiving, the Louisiana legislature violated the due process clause of the Fourteenth Amendment. *Smith v. California*, 361 U.S. 147 (1959); *Lambert v. California*, 355 U.S. 225 (1957); *Schaffer v. United States, supra, Kasle v. United States, supra.* The Court charged the jury that it might presume guilt from the mere recent possession of stolen money (R. 460-462). This was held improper in *Kasle v. United States, supra.* Whether the Louisiana statute defining the crime of receiving stolen things and the Court's charge to the jury meet constitutional standards of due process are issues deserving of review.

6. Although provisions of the Louisiana Criminal Code specifically prohibit appeals to prejudice in summations to the jury (Revised Statutes 15:381), in this case the prosecutors told the jury that society would be better off with petitioner in jail, that he maneuvered criminals on the street like checkers, and that he was a greedy old man compelling desperate and destitute people to rob and steal. (R. 89-90). No evidence was adduced to prove these claims. Moreover, they were not only untrue but were also highly inflammatory. The duty of the prosecution is not that it shall win a case but that justice shall be done. *Berger v. United States*, 295 U.S. 78, 88 (1934); *Jencks v. United States*, 353 U.S. 668, 671 (1956). Prejudicial remarks in argument to a jury are especially harmful when made by a representative of the government - the Dis-

trict Attorney. *United States v. Spangelet*, 258 F.2d 338, 342 (2nd Cir. 1958). Although no objections were made to the remarks of the prosecutors at the trial, the issue was raised in a motion for a new trial (R. 30-32). A prejudicial summation may be considered of such a serious nature as to warrant a new trial even in the absence of exceptions. *State v. Henry*, 196 La. 218, 198 So. 910 (1940); *State v. Smith*, 196 La. 652, 199 So. 791 (1941). Here, the summation clearly departed from the bounds of propriety and deprived petitioner of a fair trial. He should not be required to spend eight years at hard labor on this record.

7. Petitioner has been denied bail pending appeal upon the basis of his sentence for five years at hard labor under Count One of the information. Petitioner asserted and submitted medical evidence to show that he has had two heart attacks, hypertension and diabetes (R. 28). No claim is made that he will abscond or that he will endanger society if released on bail. Under Louisiana law, however, those who appeal convictions on non-bailable offenses are penalized. They remain in jail and their period of detention is not counted in computing their time served. Revised Statutes 15:566. Those who do not appeal are delivered to the penitentiary and begin serving their sentence immediately. Petitioner has been in the Parish jail since November 24, 1965. Had he been sentenced to one day less on Count One he would have been entitled to bail as a matter of right.

The effect of Louisiana law is to create a conclusive presumption that a person sentenced to four years and eleven months is a bailable risk but one sentenced to five years is not, regardless of the crime or the individual's health and background. This presumption violates due process. *Manely v. Georgia*, 279 U.S. 1 (1928); *Schlesinger v. Wisconsin*, 270 U.S. 230 (1925); *Heiner v. Donovan*, 285 U.S. 312 (1931); *Adler v. Board of Education*, 342 U.S. 485 (1952). This important issue relating to criminal justice in Louisiana should be reviewed.

CONCLUSION

Certiorari should be granted and the judgment below reversed.

Respectfully submitted,

JACK WASSERMAN
DAVID CARLINER
Warner Building
Washington, D. C.

G. WRAY GILL
GEORGE M. LEPPERT
Pere Marquette Building
New Orleans, Louisiana

Attorneys for Petitioner

APPENDIX A - OPINION OF SUPREME COURT OF LOUISIANA

MONDAY MAY 2 1966

SUPREME COURT OF LOUISIANA

STATE OF LOUISIANA

v. No. 48,057

NICK CHRISTIANA

APPEAL FROM THE CRIMINAL DISTRICT COURT FOR THE PARISH OF ORLEANS, SECTION "E", STATE OF LOUISIANA; HONORABLE RUDOLPH F. BECKER, JR., JUDGE

HAMITER, Justice.

A bill of information filed in the Criminal District Court for the Parish of Orleans charged in two separate counts that on September 1, 1965, within the jurisdiction of such court, one Nick Christiana (the defendant herein) did (1) * * * wilfully and unlawfully become an accessory after the fact, in that the said NICK CHRISTIANA, after the commission of a felony, to-wit Armed Robbery, by one THOMAS WILLIAMS, did harbor, conceal and aid the said THOMAS WILLIAMS, knowing and having reasonable ground to believe, that he, the said THOMAS WILLIAMS had committed the said felony and with the intent that the said THOMAS WILLIAMS might avoid and escape trial, conviction and punishment, * * *" and (2) "* * * illegally and intentionally procure, receive and conceal a thing of value, to-wit: Six Hundred and Thirty-Nine * * * ($639.-00) Dollars in United States Currency, belonging to the Beneficial Finance Co. a corporation authorized to do

business in the State of Louisiana which said thing of value had been theretofore the subject of a theft, under circumstances which indicate the said NICK CHRISTIANA knew, or had good reason to believe, that the aforesaid thing of value was the subject of a theft, * * *." With respect to the second count the information was later amended to allege that the "thing of value" was $635.

Tried by a jury, the accused was found guilty as charged under count 1 and guilty of receiving stolen things valued at $655 under count 2.

Thereafter, the judge sentenced the defendant to serve at hard labor in the state penitentiary for a period of five years on the first count and for a period of three years on the second count, the sentences to run consecutively.

From his conviction and sentences the defendant is appealing, he relying for a reversal on eight perfected bills of exceptions.

Bill No. 1 was taken to the court's overruling defendant's pretrial motion to suppress certain evidence ($635 in cash and a pistol) alleged to have been seized through an illegal entry, arrest and search, and also to suppress other evidence secured by means of a search warrant, it being appellant's contention that the affidavit supporting the warrant was based on information obtained in the earlier illegal search. Bills Nos. 2 and 3 were reserved when the court overruled defendant's objections to the introduction of such evidence during the course of the trial. Since these three bills involve the legality of the initial entry, arrest and search, they will be considered together.

The circumstances surrounding the mentioned entry, arrest and search are as follows: On September 1, 1965, at about 2:00 o'clock in the afternoon, Officers Flint and Fields of the Police Department of New Orleans received a report that an armed robbery had just taken place at the Beneficial Finance Company located in such city. Thereupon, these officers, having been informed earlier in the

week (by a confidential informer) that Thomas Williams, who was out on bond for a previous armed robbery, owed quite a bit of money to the bondsman and was planning to "make a big score" to fulfill his obligation, took with them pictures of Williams and two others when going to the finance company office to investigate the robbery.

Williams was identified from his picture by the employees of the finance company as the man who had just held up them at gun point. The officers then arranged for a "pick-up order" on Williams to be broadcast. Also they being aware that Williams was armed, returned to the police station at Tulane Avenue and South Broad Street to secure shot guns to assist in effecting his arrest.

While the officers were at the police station, within one-half hour of the commission of the robbery, they received information through a police broadcast that Williams had just entered a building at 534 South Broad Street, this being the location of defendant's bail bonding business and is situated across the street from such station. (An account of the robbery and a description of Williams, his clothes, etc., had been broadcast over a taxicab intercommunication system. The information that the suspect had gone into the South Broad Street address was furnished to the police by a cab driver who had picked up a passenger fitting the description of Williams and had discharged him at such address.)

Officer Flint, with Officers Field and Perrot following, then ran across the street, entered the bonding company building, and asked of an employee the whereabouts of Williams and Christiana. They were directed to an office in the rear of the structure. The door to that office was closed but unlocked. Without knocking, or announcing the presence of officers, Flint pushed open the door and immediately informed Williams (while pointing a shot gun at him) that he was under arrest.

Williams was sitting at a desk in the office, he facing the door, and had leaned forward as Flint entered. The

defendant was seated in a chair in front of the desk, his back to the door, with his right hand extended over the desk and holding paper currency. On the desk under his hand were two $10 bills.

Flint was primarily watching Williams, but he saw defendant "take his right hand and shove this money into his right pants pocket." Seconds later Perrot entered and handcuffed Williams. A search of Williams disclosed that he had no money or gun on his person, although there were eight .380 caliber automatic cartridges in his shirt pocket.

At first, Williams and the defendant refused to divulge information about the money or any gun. Rather, the latter denied that he had received any sums from Williams. Whereupon the officers searched the desk at which Williams was seated and therein they found a loaded .380 caliber automatic pistol used by him in robbing the finance company.

Following further questioning of Williams and the defendant as to the ownership of the currency and the pistol, the latter was placed under arrest and searched. In his right pants pocket was $635. This money and the pistol were the principal subjects of the motion to suppress.

In connection with bills of exceptions Numbers 1, 2 and 3 the defendant urges that the police officers' "unannounced" entry into his private office was illegal and, hence, the subsequent arrest and search of him were unlawful. He further contends that even if the entry was legal, his arrest was illegal because made without probable cause and, therefore, the evidence obtained by a search of his person after his unlawful arrest was inadmissible.

The argument that the entry made by the unannounced opening of an unlocked door to his private office was illegal is based on the following underscored portion of LRS 15:72 reading: "To make an arrest, a private person, if the offense be a felony committed in his presence, or a

peace officer with a warrant or in cases of felony when authorized without a warrant, may break open an inner or outer door of any building in which the person to be arrested is or is reasonably believed to be, if, after he has announced his purpose, he is refused admittance." (Underscoring ours)

It is conceded that initially the officers had neither a search warrant nor an arrest warrant. Therefore, the first question presented is whether the evidence secured must be excluded because the officers, even though they had probable cause to make an arrest and search of Williams, failed to comply strictly with the above emphasized statutory provision.

In People v. Maddox, 294 P. 2d 6, the Supreme Court of California considered that question, it having been raised under a California enactment which is almost identical with ours. Therein the court said: "It must be borne in mind that the primary purpose of the constitutional guarantees is to prevent unreasonable invasions of the security of the people in their persons, houses, papers, and effects, and when an officer has reasonable cause to enter a dwelling to make an arrest and as an incident to that arrest is authorized to make a reasonable search, his entry and his search are not unreasonable. Suspects have no constitutional right to destroy or dispose of evidence, and no basic constitutional guarantees are violated because an officer succeeds in getting to a place where he is entitled to be more quickly than he would, had he complied with section 844. Moreover, since the demand and explanation requirements of section 844 are a codification of the common law, they may reasonably be interpreted as limited by the common law rules that compliance is not required if the officer's peril would have been increased or the arrest frustrated had he demanded entrance and stated his purpose. Read v. Case, 4 Conn. 166, 170; see, Restatement, Torts, Section 206, comment d. Without the benefit of hindsight and ordinarily on the spur of the moment, the officer must decide these ques-

tions in the first instance. * * * * We conclude therefore that when there is reasonable cause to make an arrest and search and the facts known to him before his entry are not inconsistent with a good faith belief on the part of the officer that compliance with section 844 is excused his failure to comply with the formal requirements of that section does not justify the exclusion of the evidence he obtains." See also State v. Smith, 37 N.J. 481, 181 A. ed. 761 (commencing at page 769) and State v. Carr, 197 A. 2d. 663 (Conn.). (Underscoring ours)

The same issue was again presented in People v. Ker, 15 Cal. Reptr. 767, 195 Cal. App. 2d. 246. In that case the Maddox decision, which recognized that there are exceptions to the statutory provision that officers must announce their presence and explain the purpose before forcible entry, was approved. On certiorari to the United States Supreme Court the holding in the Ker case was affirmed. See 374 U.S. 23, 10 L.Ed. 726.

People v. Maddox was also approved by the California court in People v. Potter, 300 P.2d. 889, involving an arrest for armed robbery, and in People v. Ramsey, 320 P. 2d. 592, involving the commission of an abortion.

The principles involved in the mentioned California cases were sanctioned by the Supreme Court of Pennsylvania in Commonwealth v. Negri, 414 Pa. 21, 198 A. 2d. 505. There police officers had entered, unannounced, the hotel room of the accused in New York, he being sought on a murder charge. It was urged that the entry was illegal as being violative of a New York statute similar to ours. But the Pennsylvania court said: "* * * assuming that the officers' entry, by use of a key obtained from the hotel clerk, is the legal equivalent of a 'breaking in,' it has been recognized from the early common law that a 'breaking in' without prior announcement is permissible in executing an arrest under certain circumstances. See, 4 Wharton, Criminal Law and Procedure, Sections 1624, 1625 (1957), and Ker v. California, supra. Here justifica-

tion for the officers' mode of entry was emphatically present. Involved was a well-armed fleeing felon whom the officers had every right to believe would not be taken with out a fight. That they were in serious peril cannot be questioned. The danger would be increased had entrance been demanded or purpose announced. A decision had to be made quickly on the basis of the facts then before them. Under such circumstances, the method of entry was not unreasonable when viewed either under state law or constitutional standards."

In State ex rel. Naylor v. Walker, 206 F. Supp. 544 a United States District Court in Louisiana was considering the admissibility of evidence obtained after a forcible entry. The court stated: "The fact that the arresting officers broke through the door in the process of making the arrest does not make the arrest illegal. While there seem to be no Louisiana cases directly at point, I can find nothing in the jurisprudence of Louisiana to indicate in any way that such a method of making an arrest, under appropriate circumstances, would be illegal. In the case of Williams v. United States, 9 Cir., 273 F.2d. 781, the Court held that even though a California Statute provided for forced entry after a demand for admittance had been made and denied, the fact that no demand for admittance was made prior to the forced entry did not violate the petitioner's constitutional rights. The Court held there that if the officer's peril would have been increased or the arrest frustrated had he demanded entrance first, then an immediate forced entry was justified. This Court now adopts the reasoning stated in the Williams case and the cases therein cited, and holds that under the circumstances of this case, the forced entry made by the arresting officers was entirely justified and legal."

This language was quoted with approval by us in State v. Aias, 243 La. 945, 149 So. 2d. 400. See also State ex rel. Miles v. Walker, 222 F. Supp. 975.

We are of the opinion that the reasoning set forth and

the legal principles enunciated in the foregoing cases are sound. And based thereon, we think that the entry in the instant case was not illegal, although unannounced.

Undoubtedly, under the circumstances shown above the officers had, to say the least, reasonable ground to fear that an announcement to Williams of their presence and of their intended entry would place not only themselves in grave peril but quite possibly Christiana as well. (It should be remembered that at the time of entry Officer Flint had no reason to believe that defendant Christiana was other than an innocent third person whose life might be endangered by forewarning Williams of the presence of the police.) Such announcement could also be reasonably expected to give Williams time to dispose of or hide the money and gun, as well as to permit him to escape through the rear door of the building. Consequently, the entry and almost simultaneous arrest of Williams were legal, and the ensuing search of his person and of the drawer of the desk toward which he was leaning constituted a lawful search.

Likewise, we are of the opinion that there was probable cause for arresting the defendant as an accessory after the fact. The officers testified at the trial that Christiana had at first asserted that the gun (when found in the drawer) belonged to him; however, thereafter he admitted that it did not. Originally, also, he denied receiving any money from Williams, stating that the latter had come to his office for the sole purpose of borrowing $20, he apparently not realizing that the officers has seen his outstretched hand containing a large number of bills which he immediately "stuffed" into his pocket. In fact, the defendant himself admitted at the trial that he had told the officers that he had not received any money from Williams.

Clearly, such actions on the part of the accused constituted probable cause for the officers to believe that Christiana was sheltering and helping Williams to avoid

detection of his implication in the robbery and, thereby, aiding him to defeat his arrest. (For a definition of probable cause see Draper v. United States, 358 U.S. 307, 79 S. Ct. 329, 3 L. Ed. 2d. 327, and State v. Aias, supra.)

Inasmuch as the officers' entry and the subsequent arrests were legal, the ensuing searches, made in connection with such arrests, were also lawful. And the fruits thereof were properly admitted into evidence.

In reaching this conclusion we have carefully studied the authorities cited and relied on by the defendant. We do not find our decision to conflict with them in any way. All are distinguishable on the circumstances surrounding the respective entries and arrests.

In Miller v. United States, 357 U.S. 301, 2 L. Ed. 1332, 78 S. Ct. 1190, the United States Supreme Court held that it need not decide whether the requirements of the law of the District of Columbia (from whence the case arose) would admit an exception justifying noncompliance with an announcement provision, because "The Government makes no claim here of the existence of circumstances excusing compliance." In fact, the Miller case was so distinguished by the court in the later decision of Ker v. California, supra.

Again, in Wong Sun v. United States, 371 U.S. 471, 9 L. Ed. 2d. 441, 83 S. Ct. 407, in ruling inadmissible evidence obtained after a forced entry, the court stated: "Here as in Miller, the Government claims no extraordinary circumstances — such as imminent destruction of vital evidence, or the need to rescue a victim in peril — see 357 U.S. at 309 — which excused the officer's failure truthfully to state his name before he broke in."

For somewhat similar reasons the decisions from the federal circuit Courts of Appeal cited by defendant are inapplicable. In some, there is no discussion as to whether there are exceptions to the general rule, the government apparently not having urged exceptional circumstances.

In others it was found that under the facts shown no probable cause or exceptional circumstances appeared.

For the foregoing reasons we find no merit in bills of exceptions Nos. 1, 2 and 3 which, defense counsel conceded, are the most serious bills presented for our consideration.

Bill of exceptions No. 4 was reserved to the court's overruling defendant's pleading styled "Motion in arrest of judgment, to set aside verdict and for a new trial". In said pleading the defendant sets forth five alleged errors in the proceedings. They are treated hereinafter in the order in which they appear.

1 - The error alleged here is the same urged in bills Nos. 1, 2 and 3, it being that the court improperly admitted evidence obtained through an illegal entry, arrest and search.

2 - The evidence, it is contended, does not establish defendant's guilt of being an accessory after the fact beyond a reasonable doubt. The contention relates only to the sufficiency of the evidence. It is well settled in our jurisprudence that this court cannot pass upon the evidence's sufficiency, this being a matter exclusively in the province of the jury. See State v. White, 247 La. 19, 169 So. 2d. 894, and the cases cited therein.

3 - This assignment addresses itself primarily to the sufficiency of the evidence to sustain defendant's conviction for the charge of receiving stolen money. However, it is also argued that the verdict is not responsive to the information because the defendant was charged with receiving $635 in currency, whereas the verdict returned recited that he was guilty of receiving stolen things valued at $655. This slight difference could not affect the sentence which might be imposed; and in view of the total value involved it is our opinion that the discrepance is so small as to be immaterial and that no prejudice resulted to defendant as a consequence thereof.

Further, under this assignment, the defendant complains of the court's charge to the jury relative to the standard of mentality and conduct required of him and to a presumption of guilty knowledge based on his possession of the stolen money. But no objections were made to the charge when given by the judge. Under these circumstances, we cannot review the complaint. See State v. Bickham, 236 La. 244, 107 So. 2d. 458, State v. Bueche, 243 La. 160, 142 So. 2d. 381, and LRS 15:391.

4 - Next, the defendant asserts that it was error for the judge to submit both counts of the information to the jury, since they involved the same offense; and that his imposing sentence on the two counts violated the double jeopardy provisions of the state and federal constitutions. In support of such assertion he cites State v. Ugarte, 176 La. 54, 145 So. 266, State v. Milanovich et al. v. United States, 365 U.S. 551, 5 L. Ed. 773, 81 S. Ct. 728, and Heflin v. United States, 358 U.S. 415, 3 L. Ed. 407, 79 S. Ct. 451.

The cases cited are inapplicable. Unlike this case, the defendants in the mentioned decisions were charged in separate counts with theft (and bank robbery) and with receiving the stolen goods. In them it was held that receiving the stolen goods was a necessary ingredient of, and included in, the crime of theft (and robbery). Here the accused was charged with being an accessory after the fact of armed robbery and also with receiving the stolen goods. (In this jurisdiction an accessory after the fact cannot be charged and convicted as a principal. LRS 14:23-25). Clearly the two offenses are not identical; one is not merely a lesser grade of the second crime; nor is it necessarily included in the other.

Moreover, distinctly different acts of this defendant were relied on as evidence to convict on the two separate offenses. Thus, receiving the $635, knowing or having good reason to believe it was stolen, constituted the crime denounced in the second count; whereas, the accused's

permitting the gun to be concealed by Williams in his desk drawer, his telling the officers that the pistol belonged to him when they located it, his denying that he had received money from Williams and asserting that the latter was in his office merely to obtain a loan, were obviously acts committed to aid the said Williams to avoid detection and arrest as is set forth in the first count. See State v. Calvo, 240 La. 75, 121 So. 2d. 244 and LRS 15:279.

5 - The remaining error alleged in defendant's motion is that remarks of the prosecutor in his closing statement to the jury were prejudicial. But no objection was urged at the time the allegedly improper remarks were made. Consequently, there is nothing for us to review. See State v. Odom, 247 La. 62, 169 So. 2d. 909, and the cases cited therein.

Incidentally, because of this conclusion, we likewise find no merit in defendant's bill of exceptions No. 8. This bill was taken to the court's refusing to permit to be filed and to be considered a defense counsel's "affidavit" of his recollection of the allegedly prejudicial remarks. Inasmuch as we are precluded from considering the complaint that prejudicial remarks were made it would serve no useful purpose to admit the "affidavit".

Bill of exceptions No. 5 was reserved when the trial court overruled defendant's "Amended Motion for a New Trial" in which he alleged that there was no legal evidence to support a verdict of guilty. There is no merit in the bill. All of the facts and circumstances recited above were shown by the evidence. Additionally, it was proved that the amount stolen from the finance company was the same sum as found in defendant's right pocket and on his desk, less a small amount accounted for by payment to the tax driver. Besides, Williams testified that when he entered the bonding company office he told Christiana that he was "hot", that he had committed an armed robbery, and that the police would probably be "all over the place" in a short time. Manifestly, there was some evidence to sustain the conviction.

Bill No. 6 was taken to the overruling of a supplemental motion in arrest of judgment wherein defendant urged that it was improper for the state to charge two separate crimes in different counts in the same bill of information. This complaint is adequately answered by the trial judge in his per curiam as follows: "The defendant, at arraignment, and during the trial, was represented by able and experienced counsel and did not move the Court to 'Quash the Information' because of misjoinder of allegations of the two crimes alleged in the Information, nor did they move the Court to force the District Attorney to elect on which count of the Information he intended to proceed, but elected to go to trial on both counts of the Information.

"The proper time to raise objection to any misjoinder or to compel the District Attorney to elect to proceed on count I or count II of the Information is by way of a motion to quash or to elect before the trial begins.

"It comes too late after trial and verdict.

"LRA - R.S. 15:226 "See also; Blankenship, 231 La. 993, 93 So. 2d. 533 and State v. Richard, 245 La. 465, 158 So. 2d. 828.

After his conviction and before sentence the defendant moved for his release on bond pending imposition of sentence. When the motion was denied Bill No. 7 was reserved. LRS 15:85 prohibits admitting to bail a person after conviction of a felony, unless a sentence of less than five years at hard labor has been imposed, in which event he is then entitled to bail pending his appeal and until final judgment. Having been convicted of two felonies the defendant was not entitled to bail, and the judge's ruling was correct. Thereafter, he was sentenced on one count to five years at hard labor. He did not then reapply for bail pending the appeal. However, even if he had, under the clear provisions of the cited statute the granting of it was not permissible.

For the reasons assigned the conviction and sentence are affirmed.

APPENDIX B - PER CURIAM OF CRIMINAL DISTRICT COURT FOR PARISH OF ORLEANS

PER CURIAM TO BILL OF EXCEPTION NO. I

TO THE HONORABLE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF LOUISIANA:

MAY IT PLEASE THE COURT:

The defendant filed a Motion to Suppress the Evidence in this matter and, particularly, one pistol and $639.00 in cash which was seized by members of the New Orleans Police Department on September 1, 1965, between 2:00 P.M. and 3:00 P.M. for the reason that said seizure was made as a result of a search that was not authorized by any search warrant nor was it incidental to a lawful arrest.

In the same motion they requested that property seized as evidence based upon a search warrant which was issued later that same afternoon be suppressed for the reason that the said search warrant obtained was illegal because it was based upon knowledge and information obtained as a result of the first illegal search and seizure, as set out above.

In order that my ruling on the Motion to Suppress might be understood, it is necessary to relate the facts, as they were presented, during the trial of the Motion to Suppress.

On September 1, 1965, Officers Flint and Fields of the New Orleans Police Force, dressed in plain clothes, after receiving a report that an armed robbery had taken place at the Beneficial Finance Company, 114-1/2 Baronne Street, went to the Beneficial Finance Company, arriving there about 2:10 or 2:12 P.M. Upon their arrival they spoke to Billie Moran, a lady named Lawson and another lady named Kuhn, all of whom were employees of the Ben-

eficial Finance Company. The two officers were informed that the employees of the Beneficial Finance Company were held up and robbed of $658.00 at 2:00 P.M. by an armed man.

The officers showed the victims of this robbery the pictures of three men, Thomas B. Williams, Oscar Conklin and Clayton Ward. All of the victims of this robbery identified the picture of Thomas B. Williams as the man who held them at gun point.

After receiving this information the two police officers who knew where Thomas B. Williams was living, had a "pickup order" broadcast for the arrest of Thomas B. Williams.

The police officers, Flint and Fields, knowing that Thomas B. Williams was armed, before going to where he was living, for the purpose of arresting him for this armed robbery, returned to their office, located at Tulane Avenue and Broad Street, for the purpose of securing sawed-off shotguns to assist them, should they encounter the said Thomas B. Williams.

While in his office, Officer Flint heard a police broadcast "that Thomas B. Williams, who had just committed an armed robbery, had just entered 534 South Broad Street".

Officer Flint, armed with a shotgun, ran through the hall of the Criminal District Court Building and across South Broad Street and entered the open front door of 534 South Broad Street, which was the office of the New Orleans Bail Bonding Company, which was operated by Nick Christiana.

Officer Flint, upon entering, saw a number of people, and he asked one of the men in the front office "Where is Nick Christiana and Thomas B. Williams?" and someone in the front office directed him to the back office. Officer Flint proceeded to the back office where he opened the door and saw Thomas B. Williams seated at a desk

facing the door and Nick Christiana seated on the other side of the desk with his back toward the door.

As Flint entered the door he immediately placed Williams under arrest and as he entered, he saw Nick Christiana with his right arm extended toward Williams and in Christiana's right hand he, Christiana, had a large roll of paper money which he, Christiana, immediately stuffed into his right pants pocket. There were two ten dollar bills on the desk.

Immediately after placing Williams under arrest, Officer Perrott, who was dressed in plain clothes, and who entered the office immediately behind Officer Flint, searched Williams and found in his shirt pocket a number of .380 caliber bullets. Williams was then questioned as to the whereabouts of the pistol and the money. He did not answer but kept staring at Nick Christiana.

Officer Perrott then opened the desk drawer where Williams had been seated and in said drawer he found and removed a fully loaded .380 automatic pistol.

Christiana was then asked if Williams had given him any money and when he denied that Williams had given him any money he was immediately placed under arrest.

He, Christiana, was then asked if he had any money on him, at which time he took out of his left front pants pocket paper money and checks which, when counted, amounted to $635.00.

Christiana was then asked if he had any money in his right pants pocket and when he answered yes, he did, but he did not know how much, Officer Flint then reached into his pocket, right front pants pocket, and removed therefrom a large roll of paper money, which, when counted, amounted to $635.00.

Officer Flint certainly had probable cause to arrest Williams and his entry into the defendant's office for the purpose of arresting Thomas B. Williams was lawful and

any reasonable search conducted incidental to the arrest of Thomas B. Williams was lawful.

What the officers saw Nick Christiana doing as they entered the office is what caused them to arrest Christiana.

Under the circumstances, the officers had more than probable cause to arrest Christiana and their search incidental to this lawful arrest was reasonable and lawful.

In *Ker v. State of Louisiana,* 374 U.S. 23 (1963), the court was faced with a very similar situation.

In that case State officers gained entrance into Ker's apartment by use of a pass key, without identifying themselves or announcing their purpose.

This was done in contravention of a California statute, similar to our own Statute R.S. 15:72.

The Court in holding the entry legal, noted the presence of exigent circumstances which authorized non-compliance with the California Statute.

How much more imperative was the situation confronting Officer Flint at the defendant's office door. To require Officer Flint to stop at this door and announce his purpose would amount to subjecting him to a hazard beyond even that required by his profession.

Evidence could have been destroyed or secreted (such an attempt was made by Christiana) while the officer waited for a refusal of admittance.

The officers or the defendant's life could have been placed in jeopardy by a delay at the door.

In *Wong v. United States,* 371 U.S. 471 (1963) the Court recognized the proposition that con-compliance may be reasonable in exigent circumstances.

I. Varon, Searches, Seizures and Immunities (1961) P. 189:

> "This right on the part of prosecution officials to search the person of one lawfully arrested, without benefit of warrant, and to seize articles found on him or in his custody such as weapons, evidence of the crime charged, contraband or other incriminating evidence, is well established."

That part of defendant's Motion to Suppress the Evidence Seized, under the Search Warrant, was based upon the proposition that the arrest of the defendant, as well as the first search and seizure was illegal, and, therefore, any and all evidence seized thereunder was illegal.

For the above reasons the Motion to Suppress the Evidence Seized was denied.

Respectfully submitted,

/s/ Rudolph F. Becker, Jr.
Judge, Section "E"

New Orleans, Louisiana

December 17th, 1965.